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Matthew Schaefer

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THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN CANADA-U.S. RELATIONS

Matthew Schaefer[†]

We were discussing earlier this morning the difference between Canadians and Americans. I think one difference that was not mentioned is that Canadians have longer memories than the Americans do. I gave a talk on NGOs at the Canadian Council on International Law in 1997¹ and I have not written anything in the area since then. But Henry, some Canadian with a long memory must have pointed this previous talk out to you, perhaps John Fried. In any event, you have forced me to update my remarks. (laughter)

MR. KING: Right, right.

MR. SCHAEFER: My talk will actually tie in with the talks this morning. Premier Rae had mentioned this morning that disputes between Canada and the United States are not just discussed between the federal governments of the two countries. Disputes are a matter of public diplomacy and every interest group is competing for public opinion on both sides of the border. Therefore, this afternoon we can explore the various groups that are in that competition for public opinion and the various groups that are involved in Canada-U.S. disputes.

I thought we would start with the definition of what an NGO is. We are not going to come to any conclusion on this matter here today. It is much debated. However, one big distinction is whether you include in businesses, for profit entities, or only non-profit entities. The standard definition or at least the most commonly used definition only refers to non-profit entities, such as environmental groups, human right groups, etc. A somewhat broader

[†] Matthew Schaefer is a Professor at the University of Nebraska College of Law where he teaches courses in International Trade Law, International Law, International Business Transactions, and International Trade Law and Policy. In 1999, he served as a director in the International Economic Affairs Office of the National Security Council and the White House focusing on WTO and sanction matters. From 1993 to 1995, he served as a consultant to the National Governors' Association and Western Governors' Association during the legislative implementation of the NAFTA and GATT Uruguay Round multilateral trade agreements. He received a B.A. in economics from the University of Chicago. His degrees from the University of Michigan include a J.D., magna cum laude, and member of the Order of the Coif, an L.L.M. in international law, as well as an S.J.D.

¹ See Matthew Schaefer, "Non-Identical Yet Twin Challenges for the World Trading System: Further Advancing the Rule of Law and Legitimacy, XXVI Proceedings of the Canadian Council on International Law 61-103 (1997) (conference held October 16-18, 1997).

definition would include associations of businesses, not the for-profit entities themselves, but at least the associations they enter into. While it is important to be aware of these distinctions, I am going to focus on the most common or narrower definition of NGO, excluding the for-profit entities for the moment. We will bring these entities back into the discussion later.

I also might add that some definitions of an NGO would include this Institute as well. This Institute has had a significant impact on U.S.-Canada relations and I think Henry in particular is to be applauded and thanked for that contribution.

THE HISTORY OF NGO PARTICIPATION IN INTERNATIONAL FORUMS

When I was assigned this topic, the two places I looked to first were prior proceedings of the Canada-U.S. Law Institute, an excellent place to start, and the writings of Steve Charnovitz. If anybody knows Steve Charnovitz, he does these amazing historical analyses of NGO participation in international affairs.²

Therefore, when people are making claims that NGO involvement is something new, he is able to rebut it by showing the long history of involvement. He wrote a terrific article, I do not have the citation for it here in my remarks, but it certainly will be in the proceedings, showing that NGO involvement in international governance is nothing new. In fact, the title of this article is "Two Centuries of Participation: NGOs and International Governance."³

Today, our focus, as always, is on U.S.-Canada relations specifically. NGO involvement in U.S.-Canada relations dates back at least a century. Indeed, others may raise examples in the question and answer period that date even further back.⁴

There has been an increase in NGO involvement both generally in the international system, as well in U.S.-Canada relations, in the last decade.⁵ Charnovitz refers to it as the "age of empowerment" of NGOs.⁶ Indeed, it is the power and institutionalized involvement that NGOs have garnered in the NAFTA and in U.S.-Canada relations, that is frequently cited to as supporting that claim more generally in the international system.

² I.e. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 45 (2003).

³ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

⁴ *Id.* at 185.

⁵ *Id.* at 265.

⁶ *Id.* at 265

Issues that NGOs have been involved in globally have included peace worker solidarity, human rights, free trade, the environment, intellectual property, transportation, narcotics, agricultural and liquor; and many of these same issues have been the subject of NGO involvement in U.S.-Canada relations as well. The items on that list I just read that are excluded as topics for NGO involvement in U.S.-Canada relations are generally a good sign, for instance, peace. Henry mentioned earlier today that the United States and Canada have the longest standing peaceful unprotected border. Both internationally and within U.S.-Canada relations specifically, environment is perhaps the field in which NGOs have been the most active.

Just to reemphasize the point Charnovitz makes in his article that globally NGO involvement is nothing new and to make the point that in U.S.-Canada relations that NGO involvement is nothing new, let me describe a few historical examples.

One of the earliest examples of NGO involvement in U.S.-Canada relations include the North American Fish and Game Protective Association, which was established in 1902. The association lobbied the legislatures of New York and Ontario to enact measures prohibiting spring shooting of waterfowl.⁷

Years later, in 1911, the National Audubon Society, the American Game Protective and Propagation Association pushed for the establishment of the Canada-U.S. Treaty to conserve migratory birds.⁸ This example is quite interesting because it ties in with other discussions that we have had at the Institute. The NGO leaders apparently explained to Canadian officials that existing U.S. legislation protecting migratory birds was of questionable constitutional status. In fact, lower federal courts struck down federal laws protecting migratory birds as not within the federal government's commerce clause powers as a topic that falls within the reserved powers of the U.S. States under the Tenth Amendment.⁹ The NGOs alerted Canadian officials that such legislation, if passed to implement a treaty, would likely survive challenge. In fact, their predictions were right. The governments of the U.S. and Canada did enter into a treaty for protection of migratory birds (it was actually the U.K. government for reasons of which most of you are aware since they were responsible for Canadian foreign relations at the time).¹⁰ The U.S. Congress passed legislation to implement the treaty obligation. In a challenge to the legislations, the Supreme Court held in *Missouri v. Holland*

⁷ *Id.* at 206-207.

⁸ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 206-207 (1997).

⁹ *United States v. Shauver*, 214 Fed. 154, *United States v. McCullagh*, 221 Fed. 288; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

¹⁰ Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755.

that the Tenth Amendment reserving powers to the U.S. States not granted to the federal government was no limit on the treaty making power of the federal government and upheld the treaty and its implementing legislation.¹¹

Therefore, the *Missouri v. Holland* case, which is basically in somewhat simplified terms the reverse of your Labor Conventions Case in Canada, really arose out of the urging of and creative thinking of a non-governmental organization¹², an American non-governmental organization, that lobbied Canadian government officials pursue the treaty.

In any description of early examples of NGO involvement in U.S.-Canada relations, it is essential to mention the creation of the International Joint Commission under the Boundary Waters Treaty in 1909.¹³ Depending on our definition, one could even consider the International Joint Commission a non-governmental organization, because, even though the members are appointed by government, they serve in their individual capacity.¹⁴

The Institute has had many discussions on the International Joint Commission in the past, including whether commission can serve as a model for solving broader Canadian-U.S. disputes. The IJC involves the public and NGOs in its work through public hearings. The IJC also establishes boards on issues in which it draws members from state and local governments, and even the private sector, to study scientific issues under their purview.

Thus, even if not an NGO itself, the IJC has significant relations with non-governmental organizations, the private sector, scientific organizations, etc. This was true in its earliest days when the International Joint Commission was used to resolve differences over the Rainy Lake in the 1920s.¹⁵ The Commission held public hearings to hear witnesses from sub-national governments, corporations, and NGOs. NGOs being heard included the Izaak Walton League,¹⁶ the Western Ontario Chambers of Commerce, and the American Legion.¹⁷

Therefore, there is a long history of NGO involvement in U.S.-Canada relations, and I should add because we are eventually going get to NAFTA, which is actually a trilateral relationship, that NGO involvement in North

¹¹ *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984, 18 Ohio Law Rep. 61.

¹² *Attorney General of Canada v. Attorney General of Ontario* (1937) 1 D.L.R. 673 (Labour Conventions case).

¹³ The Boundary Waters Treaty of 1909, Jan. 11, 1909, United States—Can., 36 Stat. 2448, T.S. No. 548.

¹⁴ See Layla A. Hughes, *The Role of International Environmental Law in the Changing Structure of International Law*, 10 GEO. INT'L ENVTL. L. REV. 243, 244-245 (1998).

¹⁵ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 240 (1997).

¹⁶ *Id.* at 248.

¹⁷ See <http://www.legion.org> (last visited Oct. 9, 2004).

American affairs among the three countries of the United States, Canada, and Mexico has origins going way back in time as well. For example, in 1936, Franklin D. Roosevelt scheduled a North American Wildlife Conference that was attended by U.S., Canada, and Mexico government officials, but also by NGOs of the three countries.¹⁸ I thought before we examined NAFTA that we would cover the criticisms of and rationales for NGO involvement within international organizations more generally.

CRITICISMS OF NGOS

There are three main criticisms you will hear with respect to NGOs being allowed to participate directly in international institutions. The first criticism is that NGOs are special interests,¹⁹ and they may not be democratic institutions themselves.²⁰ In fact, most NGO leaders are not elected by their memberships. Some would even argue that memberships rarely carefully scrutinize the policy positions taken by leaders of NGOs.

The second criticism that is frequently heard is that it is the role of national governments to balance competing interest, to hear from their NGOs, to hear from their private sector and then form a common position and take that government position to the international organization.²¹ This criticism maintains that there is no need for direct input of NGOs and business into the international forums. Rather, NGOs should give input to their own national government.

The third major criticism you hear of NGO involvement directly in international institutions is the problem of a power imbalance between the North and the South.²² Specifically, it has thought that U.S. and other industrialized country NGOs tend to have the financing and resources to actually become involved. In contrast, it is thought that developing country NGOs with little financing will not be able to obtain access in practice and will not be able to have direct input.

¹⁸ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 247-248 (1997).

¹⁹ Monica Brookman, Book Review, 25 COLUM. J. ENVTL. L. 369, 374 (2000) (reviewing ANITA MARGRETHE HALVORSSSEN, *EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW* (1999)).

²⁰ Paul Streeten, *The Role of NGOs: Charity and Employment: Nongovernmental Organizations and Development*, 554 ANNALS AM. ACAD. POL & SOC. SCI. 193, 196 (1997).

²¹ See generally Jude L. Fernando & Alan W. Heston, *The Role of NGOs: Charity and Empowerment: Introduction: NGOs Between States, Markets, and Civil Society*, 554 ANNALS AM. ACAD. POL & SOC. POL'Y & L. 8 (1997).

²² ANTHONY J. BEBBINGTON, *The Role of NGOs: Charity and Empowerment: Reinventing NGOs and Rethinking Alternatives in the Andes*, 554 ANNALS AM. ACAD. POL & SOC. POL'Y & L. 125 (1997).

RATIONALES FOR NGOS

The rebuttals you hear to these criticisms are the rationales commonly put forward for direct involvement of NGOs in international institutions. The first rationale is that a lot of governments around the world are non-democratic, so allowing NGO participation in international institutions may be a partial cure to this democratic deficit and lack of transparency that occurs in a lot of countries. Of course, in U.S.-Canada relations, that rationale does not make much sense, despite election controversies that some Canadians might have heard we have experienced here in the U.S. (laughter in audience) Both the U.S. and Canada are open, transparent democratic systems, so that rationale does not apply in the U.S.-Canada relations context. The second rationale or rebuttal you hear to the criticisms of NGO involvement is that there is an emerging transnational civil society. Therefore, there are actually groups whose interests are not put forward by any single government. Their interests are truly transnational, and they ought to be allowed direct input into the international forum because their interests will not be represented by any single national government.

What is somewhat ironic here is that we are going to see that NAFTA allows for significant participation directly by NGOs, but does not make any requirement that they be transnational. In fact, they allow single nation NGOs to have input in international processes. However, what happens once you allow that, you actually stimulate the creation of cooperative efforts among NGOs in the different countries and the creation transnational networks between NGOs. It is a chicken and egg type problem. NAFTA processes do not require any transnationalism among NGOs accessing its processes, but it has actually fostered transnational ties among NGOs by opening some processes to NGO involvement. We will see evidence of this phenomenon in a moment when we look more closely at the NAFTA. Therefore, we might ask if these two significant rebuttals to the criticisms of NGOs' involvement really do apply in U.S.-Canada relations. If these two major rationales put forth in a global context do not apply in the U.S.-Canada context, then why have NGOs actually gained a participatory role in Canada-U.S. relations?

I think there are at least three reasons. First, it is a testament to the political power of NGOs in the U.S. and Canada. They were able to obtain the access because they have significant power. The approval of NAFTA by the U.S. Congress was in doubt. The NGOs said in effect that, "If you the governments, the executive branches of government, do not give us access into the environmental side agreement and the labor side agreement, then we are going to try to defeat the approval of the agreement." In other words, NGOs, particularly U.S. NGOs, have learned to play hardball. It will be interesting to hear of the Canadian view in the question and answer period. By the way,

I have no fear of using that term, hardball. I know the results of the *Al Franken v. Fox News* dispute over the use of the term "fair and balanced."²³ Therefore, I am not going to apologize to Chris Matthews over the use of the term hardball. I am safe. (laughter in the audience).

The second reason NGOs have obtained a prominent role in U.S.-Canada relations and this reason ties in somewhat with the first, is the need for political approval and perceptions of legitimacy regarding the NAFTA. NAFTA approval in the U.S. may have been in doubt had not side labor and environmental agreements been created that allowed for access of NGOs, but, more generally, perceptions of legitimacy out in the general public may have been undermined as well.

Finally, you can make the argument that NGO involvement is a good governance measure. A recent OECD study on engaging citizens and policymaking states that strengthening relations with citizens is a sound investment in better policymaking and a core element of good governance.²⁴ It allows governments to tap new resources of policy relevant ideas, information, and resources when making decisions. Equally important, it contributes to the building of public trust in government.

Of course, the OECD study was actually talking in terms of engaging civil society in domestic policymaking, but some of those same arguments may apply internationally. Possible benefits of NGO involvement include additional technical expertise being added and rapid feedback to governments of policy choices. Additionally, NGOs may be able to add intergenerational authenticity in such areas as environmental issues. Finally, NGO involvement can lead to increased accountability through increased monitoring of the behavior of nations, because nations often do not want to complain about another nations' behavior due to higher political or diplomatic reasons.

NAFTA

As noted earlier, NAFTA is an example of the age of empowerment of NGOs in U.S.-Canada relations, but also pointed to as evidence of the age of empowerment of NGOs globally. This highlights the importance of NAFTA.

I wanted to look primarily at the side environmental agreement, the North American Agreement on Environmental Cooperation,²⁵ the side labor agree-

²³ *Fox News Network, LLC v. Penguin Group (USA), Inc.*, 2003 U.S. Dist. LEXIS 18693; 31 Media L. Rep. 2254 (S.D.N.Y. 2003).

²⁴ OECD, FIGHTING CORRUPTION: WHAT ROLE FOR CIVIL SOCIETY? THE EXPERIENCE OF THE OECD, available at: <http://www.oecd.org/dataoecd/8/2/19567549.pdf> (last visited Sept. 23, 2004).

²⁵ North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., arts. 22-36, 32 ILM 1480, 1482 (text) (entered into force Jan. 1, 1994).

ment, the North American Agreement on Labor Cooperation,²⁶ and on NAFTA Chapter 11,²⁷ the investment chapter of NAFTA. I am not going to discuss Chapter 20, the general dispute settlement mechanism of NAFTA. There have not been many Chapter 20 disputes. In fact, there has only been only one Chapter 20 dispute between the U.S. and Canada, which I think Sidney Picker knows a little bit about. Nor am I going to discuss Chapter 19 of NAFTA providing for bi-national panel review of national administrative determinations in the field of anti-dumping and countervailing duties.

THE SIDE ENVIRONMENTAL AGREEMENT

The side environmental agreement has an obligation that countries effectively enforce their domestic environmental laws.²⁸ It also has a weak obligation to strive for high levels of environmental protection, but this latter obligation is not subject to the dispute submission process.²⁹

The obligations that are subject to the submission process for NGOs and the formal dispute settlement process is that a country effectively enforce its domestic environmental laws. The submission process allows any NGO or person to make a submission to the independent secretariat, which is based in Montreal.³⁰ The secretariat does have to get their budget and work plan approved by the council,³¹ comprised of the environment ministers from the United States, Canada and Mexico.³² However, the secretariat operates independently in most respect and is the body that receives NGO submissions on enforcement matters.³³ In their submissions to the secretariat, NGOs must make a claim that the accused party is failing to enforce effectively its environmental law. The secretariat can then make a recommendation to the council that the submission warrants development of what is called a factual

²⁶ North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., arts. 27-41, 32 I.L.M. 1499, 1502 (text) (entered into force Jan. 1, 1994).

²⁷ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057, reprinted in 32 I.L.M. 289 (1993).

²⁸ OECD, CITIZENS AS PARTNERS: INFORMATION, CONSULTATION AND PUBLIC PARTICIPATION IN POLICY-MAKING, available at: <http://www1.oecd.org/publications/e-book/421131e.pdf> (last visited Sept. 25, 2004).

²⁹ North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., prt. 2, art. 3, 32 ILM 1480, 1482 (text) (entered into force Jan. 1, 1994).

³⁰ See http://www.cec.org/who_we_are/secretariat/index.cfm?varlan=english (last visited Sept. 24, 2004).

³¹ North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., part 3, Article 10 32 ILM 1480, 1482 (text) (entered into force Jan. 1, 1994).

³² Gillian Dale, *NAFTA: Commission for Environmental Cooperation*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y 26 (1997).

³³ See Guideline art. 2.1, Guidelines Submissions, NACEC, Council Resolution 99-06, available at: http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english (last visited Sept. 25, 2004).

record. This only requires two-thirds vote of the council. Therefore, two of the three environmental ministers must vote in favor of it to go forward. Once completed, the factual record is made public upon a two-thirds vote of the council³⁴

There is no further remedy at the end of the NGO submission process. NGOs can make submissions, the secretariat upon two-thirds approval can develop a factual record, but, at the end of the day, all the submission process can lead to is placing sunshine on the environmental enforcement problem. It puts the problem in the public eye. There have been about 41 submissions under the side environmental agreement made by NGOs since NAFTA came into force in 1994.³⁵

Out of those 41 submissions, a lot, particularly the early ones, were dismissed by the secretariat even prior to the secretariat requesting the development of a factual record. Why is that? Why were they dismissed? Well, for a variety of reasons. First, a change in a country's law that lowers environmental protection is not a failure to enforce law. It is a change in law. So is there were several early submissions complaining about changes in laws, rather than failure to enforce.

Second, one of the factors that the secretariat has to take into account before pursuing a factual record is whether judicial or administrative remedies are being pursued.³⁶ It is not a strict exhaustion of local remedies requirement, but it is a factor they take into account. There have been submissions dismissed on these grounds. Finally, there have also been cases dismissed because parties are complaining about an alleged violation of an international agreement, rather than failure to enforce effectively a country's domestic environmental laws.

However, more and more submissions are going to the factual record stage. There have been nine factual records that have been prepared.³⁷ When the side agreements were negotiated, the prototypical case envisioned were submissions by NGOs from Canada and the U.S. against Mexican enforcement practices. However, the law of unintended consequences prevailed and there have been a variety of cases brought against each of the three countries. Of the nine factual records prepared by the environmental

³⁴ *Id.* at art. 10.4.

³⁵ Editor's note, as of September 26, 2004, there are now 47 submissions, *see* <http://www.cec.org/citizen/status/index.cfm?varlan=english> (last visited Sept. 26, 2004).

³⁶ *See* Guideline art. 5.6(c), Guidelines Submissions, NACEC, Council Resolution 99-06, available at: http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english (last visited Sept. 25, 2004).

³⁷ *Id.*

secretariat, four have involved Canadian practices,³⁸ four involved Mexican practices,³⁹ and one involved U.S. practices.⁴⁰

In the one case against the U.S., there was an alleged lack of enforcement by the federal government of the ban on the killing of migratory birds. The interesting thing here is that although an NGO making a submission is not required to be transnational, in this case, because it involves a transnational issue, there were NGOs from the U.S., Mexico, and Canada, from all three countries, that were the submitters in this case. The Canadian cases under the side environmental agreement are a bit different.

All four Canadian cases were cases brought by Canadian NGOs, which is why if you look at the proceedings of this Institute, there was question a year or two ago that said basically this submission process being used by Canadian NGOs to kick the teeth of the Canadian government.

However, whether or not one agrees with that claim, the newer cases indicate a much more transnational bent, even with respect to submissions involving Canadian enforcement practices. Of the eleven active files that are now ongoing, what is prevalent is an increase in collaboration amongst NGOs in U.S., Canada, and Mexico as submitters. You are not seeing the single nation NGO submitter as frequently. Moreover, Mexican practices, while frequently examined, are still not the only enforcement matters being complained of in NGO submissions. In fact, of the active files, you have seven concerning Mexico,⁴¹ four concerning Canada⁴² and none related to U.S. practices.⁴³

However, the interesting feature is the amount of submissions that are being made by NGOs from two or three countries. In one case, the Ontario Power Generation case, that is alleging that emissions of mercury and other dangerous toxins are polluting air and water downwind, both in Canada and the United States, there are 49 NGOs that are the submitters in that case.⁴⁴

I think that is quite an interesting development. The submission process was created without requiring transnationalism of the submitters but the system itself is fostering transnational alliances between NGOs.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Editor's note, as of Sept. 26, 2004, there are now 8 claims against Mexico, *Id.*

⁴² *Id.*

⁴³ Editor's note, as of Sept. 26, 2004, there is now a claim against the U.S., *Id.*

⁴⁴ Editor's note, the Ontario Power Generation claim was not recommended for preparation of factual record, however, the names of the submitters are available at: <http://www.cec.org/files/pdf/sem/01-SUB-CECf.pdf> (last visited Sept. 26, 2004).

THE LABOR SIDE AGREEMENT.

Like the side environmental agreement, the side labor agreement is focused on failure to enforce effectively domestic labor laws. The system is somewhat different in the environmental side agreement. Each country establishes what is called an NAO, a National Administrative Office, within their labor department. NGOs or labor unions can complain to the NAO in their country about another nation's failure to enforce their labor laws.⁴⁵ Therefore, in other words, you do not complain to the U.S. NAO about a failure of the U.S. government to enforce its labor law. You complain to either the Canadian NAO, or the Mexican NAO about U.S. enforcement practices and vice-versa.

As with the environmental side agreement, it was envisioned that the side labor agreements complaint process would primarily involve cases against Mexico. This vision is a little bit truer under the side labor agreement than the side environmental agreement. There have been 26 cases,⁴⁶ primarily complaints dealing with Mexico. Of the complaints brought against the U.S. practices, most have been lodged with the Mexican NAO.

However, there have been two submissions filed with Canada's NAO regarding U.S. practices⁴⁷ and two submissions filed with the U.S. NAO about Canadian practices.⁴⁸ Therefore, there is some Canada-U.S. dynamic even under the side labor agreement. Again, four out of the 26 cases have been U.S.-Canada cases.

Two of the four U.S.-Canada cases were not accepted for review⁴⁹ and of the other two, one resulted in a new memorandum of understanding between the INS and the Department of Labor dealing with migrant workers,⁵⁰ and the other led to a meeting by the Quebec government with union representatives.⁵¹

⁴⁵ Hannah L. Meils, *A Lesson From NAFTA: Can the FTAA Function as a Tool For Improvement in the Lives of Working Women?*, 78 Ind. L.J. 877, 890-891 (2003).

⁴⁶ NAFTA Turns Ten 1994-2004, NACLA Report on the America (2004) at America 6.

⁴⁷ Canadian NAO Submission 98-2, 99-1, *available at*:

http://www.naalc.org/english/summary_canada.shtml (last visited Sept. 25, 2004).

⁴⁸ U.S. NAO Submission 9803, 9803, *available at*:

http://www.naalc.org/english/summary_usa.shtml (last visited Sept. 25, 2004).

⁴⁹ U.S. NAO Submission 9804, *See* http://www.naalc.org/english/summary_usa.shtml (last visited Sept. 25, 2004), Canadian NAO Submission 99-1, *available at*:

http://www.naalc.org/english/summary_canada.shtml (last visited Sept. 25, 2004).

⁵⁰ Canadian NAO Submission 98-2, *available at*:

http://www.naalc.org/english/summary_canada.shtml (last visited Sept. 25, 2004).

⁵¹ U.S. NAO Submission 9803, *available at*:

http://www.naalc.org/english/summary_usa.shtml (last visited Sept. 25, 2004).

CHAPTER 11

Chapter 11 allows private investors to bring claims against host governments for violation of the substantive obligations in the NAFTA Investment Chapter, primarily obligations requiring national treatment, most-favored-nation treatment, the international minimum standard of treatment, and international standards regarding expropriation.

Depending on how we define NGO, a private investor or for-profit entity can be considered an NGO under some definitions. Private investors have access to the Chapter 11 system,⁵² but one of the things that has come up in these cases, because some of them have environmental implications or labor implications, is there has been a push by NGOs, again using our commonly understood definition of not-for profits entities only, to be able to file amicus briefs in these cases.

There have been two cases where NGOs have asked for the ability to file amicus briefs. The first case where the issue of filing amicus briefs was raised was the Methanex case.⁵³ It was a case that dealt with a complaint by a Canadian investor regarding California's ban on MTBE, an additive in gasoline. Some parties say MTBE only makes ground water smell very bad when leaks into it. Other parties say well, if it smells funny, there is probably something else wrong with it that can harm us.⁵⁴ UPS was the other case in which NGOs asked for the ability to submit amicus briefs.⁵⁵ UPS brought a Chapter 11 case arguing that the Canadian postal monopoly was assisting the express mail services in Canada, and that Canadian customs is giving some preferential treatment to express mail packs by Canada Post that it is not giving to UPS.⁵⁶

In both those cases, the NAFTA Chapter 11 arbitral panels were working under the UNCITRAL arbitration rules, and there is nothing explicitly in those rules on the issue of amicus briefs. Both arbitration panels interpreted broader provisions in those rules to basically allow submission of amicus briefs.

⁵² Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 84 (2000).

⁵³ Press Release, International Center for the Settlement of Investment Disputes, *Methanex v. United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceeding (Jan. 30, 2004) (on file with ICSID, Washington, D.C., U.S.A.).

⁵⁴ Benjamin W. Putnam, *The Cross-Border Trucking Dispute: Finding A Way Out of the Conflict Between NAFTA and U.S. Environmental Law*, 82 Tex. L. Rev. 1287, 1308 (2004).

⁵⁵ *UPS v. Canada*, para 73 (ICSID (W. Bank) Oct. 17, 2001), available at: http://www.dfait-maeci.gc.ca/tna-nac/documents/IntVent_oct.pdf (last visited Sept. 23, 2004).

⁵⁶ *UPS v. Canada*, paras. 9-10 (ICSID Nov. 22, 2002), available at: <http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf> (last visited Sept. 23, 2004).

In those cases, Mexico, because they have the ability to submit their views in these cases, argued against allowing amicus briefs by NGOs,⁵⁷ and the private investors in these cases argued against it as well, at least in the Methanex case.⁵⁸ However, the interesting development is that the U.S., Canada and Mexico have now issued a statement by the trade ministers from all three countries saying nothing in NAFTA Chapter 11 prohibits the submission of amicus briefs in Chapter 11 cases. Additionally, the trade ministers' statement lays out the criteria that future Chapter 11 panels should consider when deciding whether to accept an amicus brief from a particular entity.⁵⁹

The basic factors that are to be considered are whether the NGO has a particular knowledge or insight that is different from that of the disputing parties. Essentially, arbitrators are to ask whether the NGO is bringing something new to the table and that the NGO amici are going to address matters within the scope of dispute, so they are not expanding the scope of the dispute. Additional factors that the arbitrators are to consider are that the NGOs have a significant interest in the arbitration, and that there is a public interest in the arbitration.

Now, a further development that some NGOs are seeking is that we have open hearings for Chapter 11 arbitral hearings. In the UPS case, I believe they did have an open hearing.⁶⁰ Mexico is still opposed to opening up to the public Chapter 11 proceedings,⁶¹ but Canada and the United States made a statement late last year when they made this joint statement with Mexico on amicus briefs.⁶² Canada and the United States basically said, "We will consent to open up Chapter 11 proceedings involving us, and we will request the private investor that we are facing to also agree to open up the proceedings."

So is this age of empowerment that is reflected in NAFTA a good development? One could say, "Look, there was no choice, so why ask whether it

⁵⁷ *UPS v. Canada*, (ICSID June 11, 2001), available at: <http://www.dfait-maeci.gc.ca/tna-nac/documents/FirstMexican1128SubmissionAmicusJune1101.pdf> (last visited Sept. 23, 2004).

⁵⁸ David MacArthur, *NAFTA Chapter 11: On an Environmental Collision Course with the World*, 2003 Utah L. Rev. 913, 929 (2003).

⁵⁹ Andrew J. Shapren, *NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?* 17 TEMP. INT'L & COMP. L.J. 323, 348-349 (2003).

⁶⁰ See Press Release, International Centre for Settlement of Investment Disputes, *United Parcel Service of American, Inc. v. Government of Canada*, NAFTA/UNCITRAL Arbitration Rules Proceeding (Jul. 25, 2002) (stating that the parties in the *UPS v. Canada* NAFTA Chapter 11 dispute have agreed to make the hearing on the objections to jurisdiction open to the public), available at: <http://www.worldbank.org/icsid/ups.htm> (last visited Sept. 25, 2004).

⁶¹ Press Release, NAFTA Joint Commission Statement (Oct. 7, 2003) (on file with Canadian Department of Foreign Affairs and International Trade) available at: <http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf> (last modified June 27, 2004).

⁶² *Id.*

was good or bad? It was politically necessary. You do not get NAFTA unless you have the side labor agreement providing for this inclusion of NGOs at the international level.” But beyond this realpolitik answer, I think there is some reasons we can say it is beneficial. One, it does provide a backup. If there has been any failure in the domestic policy process, or enforcement process, this provides a second net that can catch defects in the policy formation process.

U.S. and Canadian systems are open, transparent and democratic, but not perfect. Therefore, it may provide a backup to remaining imperfections in our domestic processes.

You also have to ask yourself if you are an opponent to NGOs being involved in international institutions like NAFTA, that if you exclude them, what other forms of involvement are they going to pursue? Where else might they try to press the levers? So skeptics of NGO involvement might still think it is better to include them in, rather than having them press other levers or as Premier Rae warned having NGOs trying to co-op public opinion against the trade agreements.

Finally, there are truly transnational issues brought out in many of these submissions, the case regarding migratory birds being a prime example. There are numerous issues coming up in these cases that are truly transnational and ought to have transnational networks of civil society able to access the international system.

Let me finish up in two minutes because I think I am running short of time. I have largely left out businesses and labor unions from the equation so far under the definition of NGOs we have been operating under.

Obviously, businesses, for-profit entities have a huge impact and huge rule in U.S.-Canada relations, both through the market itself, the private decision of businesses, but also in terms of their lobbying efforts.

You all are familiar with the statistics. There is 1.3 billion dollars in trade each day between the two countries.⁶³ Canadian investment in the U.S. supports 640,000 jobs.⁶⁴ U.S. investment in Canada supports 1 million jobs.⁶⁵ 40 percent of U.S.-Canada trade is intra-firm trade.⁶⁶ Approximately 35,000 trucks cross daily.⁶⁷ There are 200 million people crossings each year.⁶⁸

⁶³ *Ottawa gives 229 million US Dollars to Improve Western Border Crossings*, AGENCE FRANCE-PRESSE, March 5, 2003.

⁶⁴ Earl Fry, *Canada-U.S. Economic Opportunities: A Window of Opportunity, Policy Options* (Feb. 2003) at 33, available at: <http://www.irpp.org/po/archive/feb03/fry.pdf> (last visited Sept. 24, 2004).

⁶⁵ *Id.*

⁶⁶ *Monthly Trade Bulletin* (Oct. 2001) available at: [http://strategis.ic.gc.ca/epic/internet/ineas-aes.nsf/vwapj/mtb200112e.pdf/\\$FILE/mtb200112e.pdf](http://strategis.ic.gc.ca/epic/internet/ineas-aes.nsf/vwapj/mtb200112e.pdf/$FILE/mtb200112e.pdf) (last visited Sept. 23, 2004).

⁶⁷ John D. Schulz, *Record Roadcheck; Three-day Commercial Truck Safety Blitz Places*

Look at the automotive industry, GM, Ford, and Chrysler are the top U.S. investors in Canada. The decisions of those private actors have a great impact on U.S.-Canada relations. In respect to unions, there is actually an alliance between telecommunication unions in the United States and Canada and even Mexico now.

In terms of lobbying, I have several examples here. I will not go through them all. There is Canadian-American Border Trade Alliance, which you will hear in about a half hour, an association involving all kinds of private entities and government entities working on border crossing issues.

There is the Canadian America Business Counsel. There is a New York State Smart Border Coalition. Americans for Better Borders is an Association and it is miss-titled, because it includes several Canadian organizations. In short, a broader definition of NGOs to include for-profit entities will reveal a whole host of additional involvement in U.S.-Canada relations.

PRINCIPLES THAT SHOULD GUIDE PARTICIPATION OF NGOS IN U.S.-CANADA RELATIONS

First, there ought to be a rule of equality between stakeholders. We should not be excluding for-profits and allowing in non-profits or trying to distinguish between certain stakeholders. There should be a rule of equality, and we actually observe one in the NAFTA system.

I mentioned under the side environmental agreement that it is mostly environmental NGOs that are the submitters. However, for-profit businesses have actually submitted petitions under the side environmental agreement in the Methanex case⁶⁹ I mentioned earlier. The Methanex case represents a two-pronged attack by the foreign investor. California, the investor alleges, was failing to enforce their underground tank storage laws, that failure to enforce led to the leakage of MTBE into the ground water, and subsequently led the state to ban MTBE. Therefore, the private investor claimed, "You expropriated our investment, you violated the international minimum standard of treatment" under Chapter 11. However, they also brought a claim under the side environmental agreement that said, "You are failing to effectively enforce your underground storage tank laws."

Thus, there is a rule of equality under the side environmental agreement. It also should be there for NAFTA Chapter 11 and it is now that all three governments have agreed to allow amicus brief submissions. That is real

Nearly One in Four Trucks Out of Service, TRAFFIC WORLD, (July 7, 2003) at 26.

⁶⁸ Facts on the Secure Flow of People, Canada-U.S. Immigration Cooperation, available at: <http://www.canadianembassy.org/border/immigration-en.asp> (last visited Sept. 23, 2004).

⁶⁹ *Methanex v. United States of America*, *supra* note 57.

change. It is also one of the ironies of NAFTA inclusion of NGOs. Traditional rationales do not apply in the U.S.-Canadian context. Were it not for Mexico being added into the free trade regime and concerns over Mexican environmental enforcement, labor enforcement and democratic deficit, we probably would not have so much NGO involvement in U.S.-Canada relations. The institutionalized involvement of NGOs in U.S.-Canada relations did not occur as a result of the U.S.-Canada Free Trade Agreement that entered into force five years prior to NAFTA. It is all as a result of NAFTA. Bringing in Mexico has actually had a positive effect on NGO involvement in U.S.-Canada relations.

A second key principle that should guide the U.S. and Canada is access of the public to information and the processes. One of the problems is that involving stakeholders is great, yet all these groups are competing to influence public opinion. If you have a closed process, you can have groups influencing public opinion through misleading characterizations of the process.

While it might be a bit much to put NAFTA cases on Court T.V. (and it is likely that people would not watch it, in fact, Court T.V. will not broadcast it because it will not get high enough ratings), more openness in the proceedings would be a positive development. The United States and Canada have agreed to open proceedings in Chapter 11 cases already. Some people say, "How can you allow all these people in the room in which the proceedings are being held; what if 150 people show up and the room allows only 20?"

The Canadian statement already foresees these problems. You can handle these problems in a variety of ways, either through webcasting on the Internet, or through closed circuit television in a separate room. Either of these solutions will prevent any disturbances protests in the room holding the proceedings. In short, there are a lot of ways with modern technology to achieve more openness for the general public. In sum, in this age of empowerment for NGOs, the two governments must ensure that they stick to the rule of equality among stakeholders and make sure that the general public is not shut out of the process.

Thank you.